A RESEARCH STUDY COMMISSIONED BY THE ONTARIO MINISTRY OF EDUCATION

A Review and Analysis of Case Law on the Integration of Exceptional Pupils Into Regular Classrooms

Principal Investigator:
Robert R. O'Reilly

Ontario Ministry of Education

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ABSTRACT

This report is an examination of all Canadian court cases and some of the major American court cases which have dealt with the issue of providing educational services to exceptional children. In particular, the issue of integrating exceptional children into the regular school programmes under the topics of mainstreaming, least restrictive environment and maximum benefit has been analyzed within the context of American, Canadian and Ontario legislation.

The American jurisprudence is larger and somewhat more mature than is the Canadian legal history on these issues. The United States have a detailed federal statute governing these matters which dates from 1974. This law, the Education for All Handicapped Children Act, has been extensively refined by supplementary regulations, commented upon in legal and educational journals, and has been referred to in many court cases, some of which resulted in decisions of the United States Supreme Court.

The Canadian legal context is characterized by an absence of specific Federal legislation on the topic, although a number of Canadian court cases have referred to the Candian Charter of Rights and Freedoms. Only a few Provinces have legislation which speaks to the education of exceptional children in any great detail. Of these, the Ontario legislation is among the first of such Canadian Provincial legislation and is perhaps the most detailed.

The Canadian and American courts have tended to reach similar decisions in these matters, although their arguments are based on quite different legislation and are issue-specific. Both legal traditions are similar in that they maintain all children have a right (although not a constitutional right) to a publicly-funded free education. The American courts have interpreted their legislation as guaranteeing the right of all exceptional children to be educated in the least restrictive environment possible where there is the probability of reasonable academic progress. The courts have also interpreted their legislation to mean that no child is guaranteed the best education possible but only sufficient services to enable reasonable progress.

The Canadian courts have intervened less in the decisions of duly constituted decision-making bodies in the field of education, provided the child receives basic rights. Among these rights are the right to a public education and the normal common law rights of due process. To date, the judgments of Canadian jurists have not deviated in any significant way from the judicial reasoning emanating from the American justices.

Finally, the courts are not inclined to assume a mantle of educational expertise to make educational

decisions. The courts, to date, seem to be reluctant to examine either the content or the quality of educational decision-making. Their role tends to be to ensure that the rights of individuals are assured, and that educational decison-makers follow appropriate rules and processes in making decisions regarding the educational rights of exceptional children.

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I. INTRODUCTION

Scope of the Research

The purpose of the report is to examine case law in both Canada and the United States relating to the integration of exceptional pupils into regular classrooms. Particular emphasis is given to three concepts: mainstreaming, least restrictive environment and maximum benefit.

Since there have been very few Canadian cases on these subjects, we have attempted to include all Canadian reported cases, and as many of the unreported as we could locate. Given the plethora of such cases in the United States, we have selected cases which exemplify the the American judicial approach to these topics.

Mainstreaming, as used in this study, is the education of children in regular classrooms, usually in neighborhood schools.

The term "least restricted environment" is the provision of educational services in a setting which most closely resembles the "normal" setting, given the handicaps and abilities of the child.

The term "maximum benefit" is seldom used in the literature, but is taken to mean the provision of a service from which a child may derive the maximum benefit, that is progress most rapidly in meeting educational objectives.

This report is comprised of three sections. The first provides an analysis of the basic issues in the light of current legislation and case law. This section concludes with a statement of implications for Ontario provincial policy. The second lists and describes Canadian cases; the third similarly lists and describes selected American cases, particularly those which have reached the senior State courts or the Federal courts.

Educational Rights of Exceptional Pupils

The question of integration, or "mainstreaming" is based on a number of fundamental questions concerning the rights of individuals to an education and the right to be free of discrimination. Neither Canadian nor American law speaks directly to the issue of one's basic right to an education. Rather, there is an onus on children to attend school, and on their parents to ensure that children do attend school. In Ontario, the Education Act (R.S.O., 1980, c.129) does provide a right to schooling:

> 31(1) A person has the right, without payment of a fee, to

> attend school in a school section, separate school zone or secondary school district, as the case may be, in which he is qualified to be a resident pupil.

The Act also requires a child between the ages of six and sixteen years to attend school (s. 20 (1)). Thus, one has both the right and the obligation to attend school. One can also argue that in order to enjoy some of those rights described either in the Canadian Charter of Rights and Freedoms or the Constitution of the United States of America, one must have access to a free public education (MacKay, 1987a; Poirier & Goguen, 1986). The basis for this latter argument in Canadian law is Section 7 of the Charter which states:

> Everyone has the right to life, liberty and security of person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

Since there is a right to schooling, can the State deprive one of that right due to some exceptional condition such as a physical, mental or emotional handicap? The Education Act of the Province of Ontario does not permit pupils to be excused from the obligation of attending school due to "the fact that a child is blind, deaf or mentally handicapped" (s. 20 (3)). As well, the Education for All Handicapped Children Act of the United States would seem to exclude that option. (Education for All Handicapped Children Act, Public Law 94-142, 20 U.S.C. 1400).

Section 15 of the Charter would seemingly prohibit any exclusion from school of handicapped children. It states:

> Every individual is equal before and under the law and has the right to equal protection and equal benefit of the law, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or <u>mental or physical disability</u> (underline added).

Both the Canadian Provinces and Territories and the United States place the onus on public educational authorities to provide educational programs and services for exceptional pupils. Ontario requires its Minister of Education to ensure that services are available for <u>all</u> exceptional children:

> The Minister shall ensure that all exceptional children in Ontario have available to them, in accordance with this Act,

> and the regulations, appropriate special education programs and special education services, without payment of fees by parents or guardians resident in Ontario,...(s. 8(2)).

Similarly, six other provinces have enacted laws which either require school boards to provide educational services to all children regardless of special difficulties or guarantee to exceptional children the right to an educational program (Manitoba, Newfoundland, Nova Scotia, Quebec, Saskatchewan and New Brunswick). Finally, in one province without such legislation, Alberta, the Supreme Court of Alberta in *Carriere v. Lamont Board of Education* (unreported, AB, S.C. #107134, August 15, 1978) declared that the provincial legislation requires school boards to provide educational programs for all students, regardless of handicap. (O'Reilly, 1984).

The question addressed in this report is the manner in which educational services are provided to the exceptional child. In particular, assuming a range of possible modes of service delivery, ranging from a highly specialized service provided in a segregated institutional setting to services provided in any ordinary classroom in a neighborhood school, in law, under which circumstances can the State or its agencies choose to provide services in one setting rather than another? Is "mainstreaming" an option or a right? Is provision of service always to be in a "least restricted environment"? Is a "least restricted environment" the same for every child? Is each child entitled to an education which will yield the "maximum benefit" to that child?

Two Dimensions of Educational Rights

Educational rights may be viewed according to two dimensions. The first dimension consists of one's ACCESS to schooling and to a given program or setting. Thus one can have access to a program with a prescribed course of study, a given ratio of pupils to teacher, and the setting for schooling, ranging from a class in the neighborhood school to a specialized, segregated setting.

The second dimension consists of the CONTENT of schooling. This dimension refers more to quality and expected outcomes or goals of the educational process. These goals may be highly specific or general; they may be set low or high, set generally for all pupils or tailored for the needs of each pupil.

Viewed from these two dimensions, the "right to education" may be described as the right to attend school, or to attend a particular school, or to have access to certain resources within the school. On the other hand, the "right to an education" may also mean the right to achieve significant learning and growth in keeping with one's potential.

Viewed simplistically, a right to education extends only to access to one of the programs provided by the State or the local school authorities. It is then up to the profession of educators to ensure, that within the constraints of resources provided by the authorities, each child receives the attention required to develop as fully as possible.

In dealing with the handicapped, the State is somewhat more precise. In both American and Ontario law, the assumption is that exceptional children must be provided with resources and programs not normally available to other children. The Ontario law requires school boards, after due consultation with parents, to provide a "placement" in an educational setting in which the child can make educational progress. The American Public Law 94-142 goes further. It requires that parents be a member of the decision-making group which not only decides on "placement" but also establishes an individualized educational plan (IEP) for each exceptional pupil.

Three questions face parents and educational authorities. (1) Which educational setting (placement) will be best for the child? (2) Which set of objectives are most appropriate for the child? And (3), which resources must be allocated to the child in order to achieve those objectives? When there is a dispute over any of these questions, then mediation or appeal procedures are called into play. In the United States, and to a limited extent in Canada, these questions have also found their way to the courts.

Another way of examining the issue is to consider the process of education in a "systems" perspective. In such a perspective, there are INPUTS (resources) which are transformed by the educational process into OUTPUTS (achievement of educational goals). The notion of "rights", is more generally allied to INPUTS. The implicit argument is that with the appropriate set of INPUTS, then the desired OUTPUTS will flow. However, in many realms of human behavior, including such domains as schooling, learning and education, the relationships between INPUTS and OUTPUTS at the level of the individual child are rarely, if ever, predictable.

Thus, educational systems are usually provided with some flexibility to select INPUTS, judge progress towards OUTPUTS and modify INPUTS according to the best judgments of the professionals involved. At the same time, some goals may also be modified as progress is perceived to be better or poorer than anticipated.

This distinction between the two dimensions is important. For the courts are typically asked to rule on a child's rights to certain INPUTS (e.g. specially trained personnel, a regular setting, etc.). It seems reasonable that one criteria for assessing the suitability of INPUTS is to guage success in achieving goals (OUTPUTS). In fact, the American courts, as will be shown later, are basing some of their decisions, in part, on perceived OUTPUTS.

Ontario legislation regarding exceptional children places emphasis on INPUTS. When a child is identified as exceptional, an Identification, Placement and Review Committee (IPRC) of the school board determines the placement for the child in one or another of classes, schools or services. Parents are involved (as consultants to the committee) in the decisions of "identification as exceptional" and "placement". They also have a right to appeal either of those two decisions. Once a board has accepted an IPRC ruling, the professionals concerned must set educational goals and devise a program for the child. (These procedures vary considerably from those provided for by American legislation for special education).

II. EDUCATION AND THE CANADIAN CHARTER OR RIGHTS AND FREEDOMS AND THE CONSTITUTION OF THE UNITED STATES OF AMERICA

There has yet to be a Canadian court case in the domain of special education in which the Canadian Charter of Rights and Freedoms was involved. One occasion on which the New Brunswick Court (Queen's Bench) could have pronounced itself on an application of the Charter to special education was eliminated when the parties agreed to a settlement prior to trial. (see *Elwood v. Halifax County-Bedford District Nova Scotia* (1988), pp. 28-29 below). The issues in Elwood concerned INPUTS, mainly placement in a regular class or in a segregated setting. Elwood argued that placement in anything but a regular classroom was discrimination which is prohibited under Section 15 of the Charter.

The American Supreme Court has not accepted the argument that there is a constitutional right to an education. In *Board of Education of the Hendrick Hudson Central School District v. Rowley*, the court interpreted the Education for All Handicapped Children Act as granting the right to access to a free and appropriate education, rather than any right embedded in the Constitution. (See pp. 47-48 of this report for a review of *Rowley*.) This is the only case of this nature in which a decision has been rendered by the United States Supreme Court. As such it has been closely examined (Heaney, 1984; Osborne, 1988; MacKay, 1987a; Turnbull, 1986; and Yanok, 1986). As the major court decision in the United States, all subsequent decisions in all other federal and state courts have been guided by the interpretation that the Court gave to the Act.

All exceptional children appear to have a right to an education. But it appears that it is a right bestowed on them by specific legislation. No court has yet recognized that they have a constitutional or inalienable right to education.

Mainstreaming

For many people, the ideal education for any child is in a heterogeneous classroom in a neighborhood school. There has been a major trend in Western society to de-institutionalize

the handicapped and to integrate them into the larger society. In education, this process of normalization takes the form of mainstreaming or placing handicapped children in regular classes in neighborhood schools with such additional support as might be required. These include the provision of teaching assistants or aides, medical and nursing services, special equipment, required routines and therapies. There is a great deal of controversy about this issue. Some hold that any inconveniences caused by mainstreaming are greatly out-weighed by the social and educational benefits which accrue. Proponents of mainstreaming also argue that segregated facilities and programs do not provide the benefits that are claimed for them.

The notion of mainstreaming in the literature on special education has evolved in recent years. Reynolds and Birch (1982) equated mainstreaming with (a) physical space integration, (b) social integration and (c) instructional integration. Turnbull and Turnbull (1978) give the following criteria for determining a least restricted environment:

1. physical accessibility;
2. the physical presence of handicapped and nonhandicapped learners in age appropriate settings;
3. opportunities for these students to interact together; and,
4. the dispersal of these classes throughout the school system.

The most recent guideline shifts the major emphasis from the handicaps of the students to the improvement of the setting. Gaylord-Ross and Peck (1985) advocate the active enhancement of school settings so that environments become least restrictive. To achieve mainstreaming, settings should become sufficiently supportive so that handicapped children can achieve educational progress (Brady, McDougall and Dennis, 1989).

Many others claim that for some children, a specialized setting is best, for it is there that specialized help and progams can be provided. They claim that it is uneconomic, if not impossible, to provide such services in regular classes. They also claim that the presence of such children has a disruptive influence on the other children.

School authorities are routinely faced with requests of parents of exceptional children for placements and programs that are either mainstreamed or segregated. In the absence of clear rules on such allocations, and in the absence of consensus within the educational literature on the benefits of either option, the problem on occasion is directed to the courts.

The American EHA is more specific on this issue than are any Canadian laws or regulations. It states that:

> To the maximum extent appropriate, handicapped children

> ... are to be educated with children who are not handicapped, and that ... removal of handicapped children from the regular educational environment [should occur] only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily (20 U.S.C. 1412 (5)).

The American courts interpret this regulation quite strictly when they must address the issue of mainstreaming. In *Roncker v. Walter, et al.* (see the review in Appendix B), the Court of Appeal for the Sixth Circuit stated that an integrated setting was preferable. If a segregated setting was at first deemed to be more appropriate, then the school officials had to attempt to provide similar services in the integrated setting. Note that the Court appeared to concur with the notion of mainstreaming posited by Gaylord-Ross and Peck. The issue in the case was whether or not the child's "... needs requires some service which could not feasibly be provided in a class for handicapped children within a regular school ...." The court would allow three reasons for not integrating children: (1) either the child would not benefit from mainstreaming or any marginal benefits of mainstreaming are outweighed by the benefits gained from services which could not be provided in the non-segregated setting; (2) the behavior of the handicapped child is a disruptive force; (3) the cost is such that excessive spending on one child would deprive other handicapped children of services.

The question of what is feasible is also not clear in many situations. However, court decisions have pushed school officials to do as much as possible to bring services to regular schools and classes. In a consent decree in 1982 (*PARC v. Pennsylvania*), the judge mandated a school district to up-date its program for severely handicapped students. When the school officials protested that what they did was comparable to what was available in other urban districts, the judge indicated that keeping up with the "state-of-practice" was insufficient. School districts were exepected to keep up with the "state-of-the-art".

Mainstreaming was the major criterion for a decision of a Virginia federal court. Parents of a learning disabled child requested placement in a private school for the learning disabled. The court ruled that the public school provided a program whereby there would be gradual integration facilitating the transition from special to regular services. (*Rouse v. Wilson*, 675 F. Supp. 1012 (W.D. Va. 1987)).

However, providing educational services in a least restricted environment is not the first criterion of student placement.

Educational Benefit

The first criterion for the placement of handicapped children under the American P.L. 94-142 relates to meeting the instructional needs of students so that there may be educational benefits. The justification for this position is found in the statute itself.

> (17) The term 'related service' means transportation, and such developmental, corrective, and other supportive services (including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, and medical and counselling services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a handicapped child to benefit from special education, and includes the early identification and assessment of handicapping conditions in children.
>
> (18) The term 'free appropriate public education' means special education and related services .... (20 U.S.C. 1402, emphasis added).

The Supreme Court in *Rowley* examined both the intent of Congress and the articles cited above to indicate that any educational program for a handicapped child must have some educational benefit, that is, there would be a prognosis for some satisfactory progress towards educational objectives. A description of *Rowley* is provided in Appendix B. The Supreme Court in *Rowley* relied on this norm to suggest that the first criterion in determining a program for a handicapped child is that it must admit of some educational progress. This principle was followed in a 1985 case before the New Jersey Federal District Court. The parents requested that their auditorially handicapped child remain in the regular school and receive supplementary services, while the board argued for placement in a school for the hearing impaired. The court ruled that since the child was clearly benefitting educationally from the present regular environment, there was no need for a segregated environment. The court even allowed that although there may be some sacrifice in educational quality, the mainstreamed environment was providing those instructional services most crucial for her intellectual development (*Bonadonna v. Cooperman*, 619 F. Supp. 401 (D.N.J. 1985)).

The rules were also seemingly applied in another case with the opposite outcome. Parents of a severely mentally retarded son wanted a regular elementary school placement with a special teacher whereas the board recommended a state school for the mentally handicapped. The federal district court, and later the Eighth Circuit Appeal Court held that the minimal benefit for the child and the high cost to the district for a special teacher did not

justify the regular school placement. (*A. W. v. Northwest R-1 School District*, 813 F. 2d 158 (8th Cir. 1987)). Thus the special school placement was preferred on the basis of that it would be the setting where reasonable educational progress could be obtained.

Similar reasoning was applied in a case where parents of a child with cerebral palsy asked the court that their child be educated in the local school district, rather than in an adjoining district where more qualified personnel were available. The school authorities argued for the more expensive alternative program. The parents used *Rowley* to argue that their child did not require the best education. The court found that satisfactory educational progress would only be attained in the specialized facility, and ruled that the EHA did not require mainstreaming at the expense of satisfactory educational progress (*Wilson v. Marana Unified School District of Pima County*, 735 2d 1178 (9th Cir. 1984)).

Costs

Although the question of potential costs to a school board do not normally influence court decisions neither are they ignored. The Supreme Court in the *Roncker* case did list costs as one factor to consider in making decisions concerning a child's placement.

The case of *A. W.* further justified cost as a valid criterion for decison-making on the basis that the law specified that mainstreaming is to occur "to the maximum extent appropriate" (*A. W. v. Northwest R-1* at 163). To date, however, Canadian courts have not considered cost as a determining factor in questions related to the provision of educational services.

Conclusions

U.S. Decisions

Adequate educational progress continues to be the major criterion for court decisions. However, mainstreaming is such a desired goal that in some cases marginal improvements in educational progress can be sacrificed. In some cases in which special placement would result in only marginal gains for severely retarded children, the courts rejected special placement for a less restrictive alternative in the public school system (Lufler, 1985).

In general then, there is a clear preference for mainstreaming where it affords educational progress. A satisfactory definition of mainstreaming which emerges is education in the same school with non-handicapped peers, even if that service is provided in a specialized classroom within the school.

The definition of "least restricted environment" and "educational benefit" appear to be intertwined. One court offered that the "least restricted environment" is one "in which educational progress rather than educational regression can take place" (*Board of Education v. Diamond*, 808 F. 2d 987 (3rd Cir. 1986)). Similarly, a New York Federal District Court rendered a decision in which it claimed that for one multiply handicapped student, a private specialized facility offered the least restrictive environment (*Taylor v. Board of Education*, 649 F. Supp. 1253 (N.D.N.Y. 1986)).

Canadian Decisions

The Canadian courts do not have the framework of a P.L. 94-142 to fall back on. However, the Supreme Court of Canada has made some interesting remarks concerning the treatment of those who are "unequal". In *R. v. Big M Drug Mart*, Chief Justice Dickson stated that "... the interests of true equality may well require differentiation in treatment" ([1985] 1 S.C.R. 295). In the first Charter case on Section 15, McIntyre J. states:

> For the accommodation of differences, which is the essence of true equality, it will frequently be necessary to make distinctions. (*Andrews v. Law Society of British Columbia* [1989] 1 S.C.R. at 169). (See excerpts of McIntyre's remarks on p. 22 of this report).

Nevertheless, the courts in Canada have tended to allow the school boards to make educational decisions, provided they follow the procedures laid down by the Provincial government and that no harm is done thereby to the child. To borrow from a statement from the American Supreme Court's decision on *Rowley*,

> a court's inquiry ... is two-fold. First, has the state complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits? (*Rowley*, 458 U.S. at 206-207)

One Canadian example of how the court will address the possibility of "maximum benefit" is provided by the British Columbia Supreme Court (*Antonsen v. Vancouver School District no. 39* (July 14, 1989, B.C.S.C., Trainor J.)). The Court refused the application of a nine-year-old girl with learning disabilities for an order to compel the Vancouver School District Board to provide specific educational services and programs, that is a segregated setting with a lower pupil-teacher ratio and a particular teaching method. Mr. Justice William Trainor, echoing the *Rowley* decision, stated that boards are under a duty to provide sufficient

accommodation and instruction, but that they have no obligation to provide the best education possible. He ruled that the board had provided a program which met the obligations of the board.

The decisions of the Alberta Court in *Yarmoloy* and the British Columbia Supreme Court in *Bales* both demonstrate the reluctance for Canadian Courts to infringe on the decision-making powers of school boards once it is clear that appropriate procedures in the decision-making process were followed and that no harm comes to the child concerned. (See descriptions of these cases in Appendix A of this report). Similarly in New Brunswick the court directed the educational authorities to follow the procedures established in the provincial legislation (*Robichaud et al. v. School Board No. 39*, Jan. 20, 1989, unreported (N.B. Q.B.), see Appendix A of this report). These decisions seem to clash with an earlier opinion of the Quebec Appeal Court which permitted a school commission to refuse to educate a child on the grounds that "some children are unteachable" (*Doré et Lapointe c. La Commission Scolaire du Drommondville*, Qué. C.A.) Legislation tends to accord rights to children to "attend school" without specifying in great detail what must occur in a school. The school curriculum is usually described in Regulations under the Act; local authorities usually have a great deal of discretion in adapting the curriculum and in determining how it will be implemented. One Canadian example which dealt with an exceptional child's right to schooling is the Alberta case of *Carriere v. Lamont Board of Education*, Supreme Court of Alberta, 15 August, 1978 (unreported). The court was quite emphatic that Alberta school law required the local school board to provide schooling for exceptional pupils. However, the education to be provided was not addressed by the court. (O'Reilly, 1985). At least one commentator found that the services provided were not at all suitable (*Just Cause*, 1985).

III. IMPLICATIONS

The principal findings of the study are as follows. First the courts tend not to interfere in the decision-making of agencies which are acting in accordance with clear legislation and within their sphere of expertise. Thus, the provision of clear guidelines which do not conflict with the basic rights of individuals are a first requirement.

Second, mainstreaming is clearly a desirable state of affairs. However, in order to successfully meet the needs of all exceptional children, it is necessary to have a range of services and options available to meet the needs of exceptional pupils.

Third, no one is entitled to the "best possible service" or "maximum benefit". A service which ensures some educational progress towards acceptable objectives appears to be sufficient.

Fourth, predictions for the unfolding of case law in this domain can be perilous as all

decisions are very context-specific and issue-specific. For example, the source of much of the American jurisprudence is *Rowley*, which decided on the needs of a gifted but auditorially handicapped child. Conceivably, if she had been a deaf and severely retarded child, the case could have been decided on other premises and we would today be dealing with a different interpretation of legal principles.

Fifth, Canadian courts are not inclined to assume a mantle of educational expertise to make educational decisions. Decisions rendered to date by and large respect the decision-making processes of duly constituted educational bodies and the results of those processes providing the basic rights of a child, including a right to an education, are not violated. The courts seem to be reluctant to examine either the content or the quality of educational decision-making.

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APPENDIX A.

SUMMARY OF CANADIAN CASES AND COMMENTS

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Alberta and the Calgary Board of Education v. Deyell (1984), 8 C.H.R.R. D/3668 (Alta. Q.B.).

ORDER SOUGHT:

The Government of Alberta and the Calgary Board of Education seek an order of prohibition to prevent a Board of Inquiry appointed under the Alberta Individual Rights Protection Act from hearing a complaint that they had discriminated against the respondent's son because of a physical characteristic.

ISSUE:

Are the discretionary grants provided to parents of children attending private schools a service customarily available to the public and thus covered by the Act?

DECISION OF THE COURT:

Kelly McClung is an epileptic with behavioral and emotional problems. He attended a private school in Denver. The Calgary Board of Education paid the full cost of the tuition fees, U.S. $4,750 while he attended. The parents then placed Kelly in a private school in Calgary with a tuition fee of $11,000. The Calgary Board agreed to pay $5,250 of the tuition costs, leaving the parents the remaining $5,750 of the fee. The parents argue that by refusing to pay the full cost of the fees, the Board and the Government of Alberta are guilty of discrimination based on a physical characteristic.

Though education is a service provided to the public and therefore covered by the Act, it does not follow that all benefits provided under the School Act and the Department of Education Act are a matter of right rather than a matter of discretion. Section 145 of the School Act specifically characterizes a school board's decision to pay for the cost of education in private schools as discretionary. Similarly, the Department of Education Act and the Regulations passed under it stipulate that such grants are discretionary.

In the relevant year, Alberta provided $4,650 to help the handicapped pupil attend private school. The Calgary Board did not choose to contribute the additional amount to cover the full cost of the fees. There was no evidence before the Court that either the Government of Alberta or the Calgary School Board had adopted policies or practices whereby they customarily provided full grants as requested by the McClungs. The Alberta Individual's Rights Protection Act prohibits discrimination with respect to a service "customarily available" to the public. As the full grants were not customarily available to the public, the denial by the board and the Government does not amount to discrimination under the Act. Accordingly, the Board of Inquiry did not have jurisdiction to hear the complaint.

APPEAL STATUS:

The case was appealed to the Alberta Court of Appeal. This decision follows.

Alberta (Department of Ed) v. Human Rights Commission (Alberta) and Calgary Board of Education and Deyell (1986), 9 C.H.R.R. D/4979 (Alta. C.A.).

ORDER SOUGHT:

To reverse the decision of the Queen's Bench to the effect that the Alberta Human Rights Commission did not have jurisdiction to hear a complaint of discrimination based on a physical characteristic. See *Deyell, supra.*

DECISION OF THE COURT:

The parents argue that their son who has a physical handicap is the victim of invidious discrimination because he has a right to an effective education which the Calgary Board failed to provide. The failure to provide effective education amounts to discrimination because it amounts to the failure to supply a public service on the basis of physical disability. As well, the Board failed to offer adequate financial support to permit the parents to get effective education elsewhere.

The Court of Appeal rejected this argument. The school board did not refuse to attempt to educate the child. Rather, the parents decided to place the child in a private school. The school board accepted this and paid a grant towards the tuition fees. The complaint is that the grant was not big enough. The Alberta Individual's Rights Protection Act does not necessarily give a handicapped child the right to a private education and therefore does not give the child any right to any financial help when he chooses a private school over a public school.

The parents might consider that they are the victims of an irrational grants policy; any deficiency in that policy is not based on the fact that the child is handicapped and is therefore not a fit subject for inquiry by the Commission. The Board of Inquiry should not undertake a study of the effectiveness of an educational authority's educational policy.

Andrews v. Law Society of British Columbia [1989] 1 S.C.R. 143.

In these excerpts, Justice McIntyre interprets the meaning of the terms "equality" and "discrimination" within the framework of Section 15(1) of the Charter. The other members of the Court concurred with these remarks.

It is not every distinction or differentiation in treatment at law which will transgress the equality guarantees of s. 15 of the Charter. It is of course obvious that legislatures may, and to govern effectively, must treat different individuals and groups in different ways. Indeed, such distinctions are one of the main preoccupations of legislatures. The classifying of individuals and groups, the making of different provisions respecting such groups, the application of different rules, regulations, requirements and qualifications to different persons is necessary for the governance of modern society. For the accommodation of differences, which is the essence of true equality, it will frequently be necessary to make distinctions (at 168).

The right to equality before and under the law, and the rights to the equal protection and benefit of the law contained in s. 15, are granted with the direction contained in s. 15 itself that it be without discrimination.

Discrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individuals or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society. Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits and capacities will rarely be so classed (at 172).

Bales v. Board of School Trustees, School District 23 (1984), 54 B.C.L.R. 203, 8 Admin. L.R. 202 (B.C. S.C.).

ORDER SOUGHT:

The parents of a mentally handicapped child seek a declaration that the child was entitled to attend a regular school, an order compelling the board to re-enroll him in an ordinary school and damages in the amount of the tutor's fees incurred after the parents had withdrawn the child from the segregated school and had hired a private tutor.

DECISION OF THE COURT:

Arron Bales suffers from a brain dysfunction resulting in a mental handicap in the mild to moderate range. From 1980 to 1983, he attended regular classes on a full-time or part-time basis. In June, 1983, the board's screening committee whose task it is to assess learning abilities and recommend placements, recommended that Arron be placed full-time in a school operated exclusively for mentally handicapped children. The parents strongly opposed the placement before the board who nonetheless accepted the screening committee's recommendation.

The parents argue that under section 155 of the British Columbia School Act, school boards have an obligation to provide "sufficient school accommodation and tuition, free of charge, to all children of school age resident in that district." To support their claim that for a mentally handicapped child "sufficient tuition" implies mainstreaming (a placement in a regular school), the parents provide evidence to demonstrate that most educators now favour mainstreaming. According to most experts in the field, the aim is to find "the least restrictive environment" for the child. This implies integrating the child into ordinary neighborhood schools with appropriate special support.

This approach has been adopted in the United States following *Penn. Assoc. for Retarded Children v. Commonwealth of Pennsylvania*, 334 F. Supp. 1257 (Pa. Dist. Ct., 1971), and *Mills v. Dist of Columbia Bd. of Educ.*, 348 F. Supp. 866 (Dist. of Columbia Dist. Ct., 1972). These cases prompted the Congress to adopt Public Law 94-142 which gives legislative force to mainstreaming.

The plaintiffs also cited the Policies, Procedures and Guidelines manual of the British Columbia Ministry of Education which strongly endorses the concept of mainstreaming.

Elected school trustees are given the responsibility of operating local school systems. Legislation must be interpreted to respect the legislative intention that the responsibility for planning and operating the school system rests with the elected trustees. The Ministry manual

cited by the plaintiffs as well as other official documents may favour mainstreaming, but they do not seek to limit the discretion given to school boards in the planning and operation of their programs for the handicapped. Nothing in these documents requires that boards integrate handicapped children into regular schools. In fact, the manual and ministerial circulars recommend a flexible approach to the question.

The Court could not conclude that the board had acted unreasonably in continuing to segregate a category of handicapped children. There was no evidence before the Court to establish that harm is caused to a child who is placed in a segregated environment. Because the board's conduct was not unreasonable, they could not be said to have offered a service which fell below the standard required by section 155 of the Act. Accordingly, the board had not failed in its statutory duty to provide "sufficient school accommodation and tuition".

The Court also rejected that the assignment of Bales to a segregated school amounted to an infringement of the section 7 of the Canadian Charter of Rights and Freedoms or to discrimination under the British Columbia Human Rights Code. The placement did not deprive the child of his "life, liberty or security of the person" which are protected by section 7 of the Charter. The segregation was imposed for the purpose of providing an adequate education for the handicapped and could not be branded as unreasonable or discriminatory.

Canadian Charter of Rights and Freedoms

Section 7

> Everyone has the right to life, liberty and security of person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

Section 15(1)

> Every individual is equal before and under the law and has the right to equal protection and equal benefit of the law, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Doré v. La Commission scolaire de Drummondville (1983), 4 C.H.R.R. D/1377 (Qué. C.A.).

ORDER SOUGHT:

The parents of a handicapped child appeal the decision of the Superior Court which had refused to issue an injunction forcing the School Board of Drummondville to accept their son, André Doré, as a pupil.

ISSUE:

Whether the statutory duty to provide special education is absolute.

DECISION OF THE COURT:

Doré is an autistic child with behavioral problems. He attended the board's schools for four years. In September 1980, the school he was attending sent him home stating that they could not keep the child in the school until they could obtain a trained teacher to deal with him. The evidence before the Court was that the child was undisciplined, disruptive and insubordinate. He also bothered the other pupils, yelled in class, and exhibited himself in front of his classmates.

Sections 480 and 189 of the Québec Loi sur l'instruction publique oblige school boards to provide educational services to children unable to benefit from regular classroom instruction because of a physical or mental handicap. Both sections use imperative language without qualifications. Section 481 of the same Act authorizes the government to enact regulations to define the nature of these special services. At the time the case was heard by the Court of Appeal, the government had not yet enacted these regulations. The result is that school boards have been forced to interpret the section.

According to the Court, the duty in sections 480 and 189 is not absolute. Section 481 which envisages the establishment of regulations supports this. As well, if this obligation was absolute, it would force school boards to teach pupils who are totally unteachable. Section 480 still confers upon school boards a discretion to determine the nature of the special education it will offer. Those offered by this board do not meet this child's needs.

With respect to the Doré child, it is not only special education, but also special medical treatment which is required. The Act does not oblige school boards to provide medical treatment.

Section 189.16 of the Act gives the board the duty to expel pupils who are habitually undisciplined or whose conduct is immoral. This section applies in this case to justify the board's decision. This is one case where the interests of the collective must take priority of those of the disruptive child.

Elwood v. Halifax County - Bedford District Nova Scotia (1988). Not a court decision, but a negotiated settlement registered with the Court.

COMMENTS ON THIS CASE

As this was a negotiated settlement, this case may have less value as a legal precedent than the cases decided by the courts or human rights tribunals. However, the case is valuable as it highlights the Charter issues relevant to the integration of handicapped children. As well, the settlement reached between the board and the parents offers an important model for future resolutions of similar disputes.

Luke Elwood is mentally disabled. His parents fought the board's decision not to integrate Luke. Instead, it preferred a special education placement. The parents obtained an injunction to prevent the special placement for the 1986-87 school year. During this period, Luke made significant progress, the result of which was a reversal of the board's position. The board conceded that the proper place for the child was an integrated placement, at least for the next two years. This led to the settlement.

The key elements of the settlement reached through arbitration were:

a) The pupil would be placed in a regular school for the next two years;
b) The parents would be involved in the development of the pupil's program. The parents did not obtain a veto over the program. They did however obtain the right to refer to an independent arbitrator any dispute between themselves and the board over their son's program.

ISSUES ARGUED IN THE LITIGATION PRIOR TO THE SETTLEMENT

1. Constitutional right to education

Elwood argued that a right to education is implicit in section 7 of the Charter. Without an education, there is no right to quality of life, liberty or security of the person. Since other sections of the Charter expressly recognize the right to minority language education, it would be absurd to deny a more general right to education. Furthermore, the right to education is a prerequisite to an effective exercise of other Charter rights such as the right to free expression and the right to vote.

The school board argued that the right to education was not in the Charter. Education is still a matter to be defined by statute and regulation and delivered by the educational administrators.

2. Due process and fundamental justice

Elwood argued that there was a denial of both natural justice and fairness at common law, as well as a breach of the procedural guaranties of fundamental justice in section 7 of the Charter. Elwood argued that there had been:

a) a lack of parental access to crucial documents and meetings;
b) a denial of the right to question school board members;
c) a brevity of notice of crucial meetings;
d) unreasonable restrictions on the length of parental submissions to the board;
e) a breach of the board's own policies and procedures regarding listing and assessment of Elwood.

The board argued that education is not one of the "life, liberty and security of the person" interests which triggers section 7 of the Charter. It was argued that Elwood was treated fairly and that the board acted in accordance with the relevant statutes and regulations and that, in any case, the policies were only guidelines and not legally binding.

3. Equality and integration

Elwood argued that integration was the only way that their son could receive the equal benefit of the law as guaranteed under section 15 of the Charter. It was argued that the pupil's placement into a special class was discrimination based on mental disability and that the burden shifted to the school board to justify this limitation under section 1 of the Charter.

The board argued that there was no discrimination under section 15 of the Charter as Elwood was not similarly situated to non-disabled students. Special placements was an affirmative action program aimed at giving Elwood equality of opportunity rather then denying it. It was argued as well that if there was any violation of equality, it was saved under section 1 of the Charter.

Hickling, Horkay, Legris v. Lanark, Leeds and Grenville County Roman Catholic Separate School Board (1986), 7 C.H.R.R. D/3546 (Ont. Human Rights Bd. of Inquiry).

ORDER SOUGHT:

That the Lanark, Leeds and Grenville County Roman Catholic Separate School Board register Hickling, Horkay and Legris in the separate school system and give them a fulltime education.

ISSUES:

1. Whether the separate school board discriminated against the 3 students on the basis of a handicap (mental) by refusing to register them in the separate school system.

2. Whether the separate school board discriminated against the three students by requiring them to attend public schools for part or all of their school day.

DECISION OF THE BOARD OF INQUIRY:

The board discriminated against the 3 students. The three students in question are "trainable retarded" which means that their degree of retardation was below the level at which they could profit from special education programs for the educable retarded. The board in question which is small and largely rural did not maintain a school or class for its trainable retarded pupils, but instead bought educational services for these pupils from the county's public school board, as permitted by section 72(2) of the Education Act. As a consequence, the three pupils attended a non-Catholic school for a significant portion of their school day, thereby denying the pupils a Catholic education for part of the day. The sole reason the pupils were denied a Catholic education for part of their school day was their mental handicap. Section 1 of the Ontario Human Rights Code prohibits discrimination on this basis. The respondent board breached s.1 of the Code. The fact that the Ontario Education Act allows one school board to purchase special services from another does not provide a defense where the effect of purchasing services from another board is to deny a Catholic education to a student who is entitled to it.

The Board of Inquiry also found that the separate school board did not reasonably accommodate the handicapped children. Reasonable accommodation as a defense to a prohibited discrimination is now found in sections 16(1) and 40(2) of the Code. Given the small number of students registered with the board and the wide dispersal of students in the large county, the board could not set up a centralized facility for trainable retarded pupils. The only way the board could educate these children would be to integrate them in regular schools. Depending on the child, reasonable accommodation may require full integration. Only when

the child could be fully integrated would an agreement as now exists between the separate and public boards satisfy the Code.

The board made the following orders:

Legris: integrate into one of the board's schools as a fulltime student.
Horkay: half-day schooling is one of the board's schools with the other half provided by the public board.
Hickling: no ruling in her case since she had progressed to secondary school and the board did not operate any secondary schools.

APPEAL STATUS:

This case was appealed to the Ontario Divisional Court. See the review of the case *Lanark, Leeds and Grenville County Roman Catholic Separate School Board v. O.H.R.C. and Hickling, Horkay and Legris* on page 33.

Hicks v. Etobicoke Board of Education, (November 23, 1988) unreported (Ont. Dist. Ct.) Q.L. Ref. [1988] O.J. 1900.

ORDER SOUGHT:

The defendant board seeks an order dismissing the plaintiff's action on the grounds that the statement of claim does not disclose a reasonable cause of action.

ISSUE:

Can parents whose exceptional child has been given a placement with which they do not agree sue the school board for negligence and damages?

DECISION:

An order to dismiss the action was granted.

Rather than appeal the placement to a Special Appeal Tribunal, the plaintiff chose to file an action for damages in a civil court.

A simple breach of a statutory duty does not give rise to a cause of action. See *The Queen v. Saskatchewan Wheat Pool* (1983) 143 D.L.R. (3d) 9.

Citing *Jones v. The Queen*, the Court found that "the courtroom is simply not the best arena for the debate on issues of educational policy and the measure of educational quality." The Court also cited *Rowett*, (see p. 41 of this report). There has been a decision of a tribunal and a placement, identification and a remedial program established with respect to the infant plaintiff. The placement was determined with notice to the parent, the remedial program was put in place as required by the statute, and it is not now open to the plaintiff to challenge the procedures and the decision in the Courts.

Lanark, Leeds and Grenville County Roman Catholic Separate School Board v. O.H.R.C. and Hickling, Horkay and Legris (1987), 60 O.R. (2d) 441, 8 C.H.R.R. D/4235 (Div. Ct.).

ORDER SOUGHT:

The separate school board appealed the decision and orders of the Ontario Human Rights Board of Inquiry. See summary, *supra.*

ISSUE:

Were the students who could not receive a full-time Catholic education discriminated against on the basis of mental handicap in contravention of the Ontario Human Rights Code?

DECISION OF THE COURT:

Students were not discriminated against on the basis of mental handicap because the separate school board lacked the amenities necessary to accommodate them.

Section 16(1) of the Code provides that a right under the Code is not infringed if the premises in question lack the amenities that are appropriate to the handicapped person. The separate school board does not presently employ the necessary aids and trained teachers to integrate trainable retarded pupils. A program similar to that received by the pupils from the public board could not be set up by the separate board as it does not have trained teachers to deal with children with mental handicaps.

The Court also felt that it was not the appropriate forum to determine the relative merits of a full Catholic education against the costs of such an education for a small group of retarded children. The Education Act sets out the proper procedure to make these determinations, with the possibility of judicial review if a party is dissatisfied with the result. That is the appropriate procedure to follow.

R. v. Big M Drug Mart [1985] 1 S.C.R. 295.

Chief Justice Dickson wrote the decision for the majority of the Court. In the following excerpt, he provides an interpretation of the term "equality" with reference to the Charter.

The equality necessary to support religious freedom does not require identical treatment of all religions. In fact, the interests of true equality may well require differentiation in treatment (at 347).

Re Dolmage and Muskoka Board of Education (1985), 49 O.R. (2d) 546 (Div. Ct.).

ORDER SOUGHT:

The appellants are seeking, through judicial review, to quash the decisions of several boards and tribunals regarding the placement of their child. The dispute concerns proper placement and availability of programs during the four-year phase-in period foreseen in the Education Act.

The reasoning of this case applies primarily to the phase-in period of Bill 82, (i.e., from 1981 to January 1, 1985).

ISSUES:

1. Should the phase-in plan prepared by the Muskoka Board have provided services and education required by the appellant Dolmage as soon as the plan was prepared?

2. Should matter be remitted to I.P.R.C.?

3. Does section 36(3) of the Education Act provide for a two-step procedure, a leave to appeal stage and, a separate and second appeal stage?

DECISION OF THE COURT:

The plan approved by the Minister did not provide for the particular type of special education sought by the appellants and there was no obligation for the Board to provide the program sought. The priorities of a board phasing-in special education programs were a matter for the Minister, not the courts. The Muskoka Board's plan allowed for a phasing-in of services and special education over a period of four years. Economics and the need to train teachers were such that years were needed to implement certain programs.

It is not for the courts to meddle with the details of the implementation of government policies nor with the rate of their implementation. Those are primary administrative, financial and policy matters which are for elected officials and not the courts.

Even if the Court found that the board had the obligation to provide the program requested by the appellants as soon as it announced its plans, the Court should not remit the matter to the I.P.R.C. as the Act requires an ongoing review of a placement and parents can request a review every three months. Recourse to the I.P.R.C. is therefore available at any time, without the necessity of quashing any decisions already made.

In response to question 3, above, the Court ruled that Section 36(3) of the Act permits an appeal to the Special Education Tribunal on the merits without first obtaining leave to appeal when the parties consent.

Re Maw et al. and Board of Education for the Borough of Scarborough and 2 other applications (1983) 43 O.R. (2d) 694 (Div. Ct).

ORDER SOUGHT:

Applicants are seeking an order requiring the relevant boards to hold a "hard to serve pupil" hearing in accordance with section 34(2) of the Ontario Education Act.

ISSUES:

1. Whether a student not enrolled in any of the board's schools is entitled to such a hearing.

2. Was there a violation of section 7 of the Charter?

DECISION:

A person, before being able to exercise "hard to serve pupil" rights, through his or her parents must be a resident pupil. Such a pupil must be enrolled in a school in the jurisdiction of the board against which relief is sought. Access to "hard to serve pupil" rights is the same as access to "exceptional pupil" rights, which is expressly limited to resident pupils in section 34(2) of the Education Act.

The right to liberty in section 7 of the Charter is not infringed by the requirement of enrolment in a school operated by the respondent board. Such a condition does not interfere with the right to choose a particular school system.

REASONS:

The Education Act (the Act) imposes a statutory obligation to supply an education to the entire spectrum of Ontario's educable students. The Act recognizes the "exceptional pupil" whose needs are dealt with through appropriate special education. The Act also recognizes that there are children who cannot be dealt with within the perimeters of the education system. These are the "hard to serve pupils." Section 34(2) of the Act provides the methods to identify these pupils. Included in these methods is the "hard to serve pupil" hearing. To determine whether a pupil who is not enrolled in any of a board's schools is entitled to a "hard to serve pupil" hearing by the board, it is necessary to interpret section 34(2). "Pupil" in section 34(2) does not refer to a student at large. It means a pupil in a particular school board. The meaning of "pupil" in the rest of the Act confirms this interpretation. It would not make sense for parents of a non-enrolled student to be able to secure a "hard to serve pupil" hearing

when one of the results of that hearing is an Identification Placement Review Committee (I.P.R.C.) hearing which the Act denies in cases of non-enrolment (s.1(1) 21.i.).

APPEAL STATUS:

The case was appealed to the Ontario Court of Appeal. See *Townsend v. Board of Education for the Borough of Etobicoke*, pp. 43-44 below.

Robichaud et al. v. School Board No. 39, (Jan. 20, 1989) unreported (N.B. Q.B.).

ORDER SOUGHT:

The applicant is seeking an injunction requiring the respondent to place an exceptional pupil in a regular class and to prepare for her an individualized educational plan.

DECISION OF THE COURT:

The child in question had attended a series of four schools, some of which were segregated. In the winter term of 1988 she attended a regular school. The following summer, the district director general recommended that she be placed in an eighth grade class in the same school. However, the school board placed her in a segregated class.

The Court granted the injunction requested by the child's parents. Under the recent New Brunswick Schools Act, exceptional students must be placed within regular classroom settings to the extent that it is considered practicable by the board having due regard to the educational needs of all the pupils. The Ministry of Education had emitted guidelines for special education services based on section 15 of the Charter of Rights and Freedoms. These provided that:

a) Each child has the right to an education within the public school system;
b) A pupil with learning disabilities is entitled to an education that reflects his/her particular needs and respects his/her style and learning skills; and,
c) Pupils with learning disabilities should be taught in as normalizing a framework as possible.

The Act also required that school districts prepare a general plan for exceptional pupils and an individualized plan for each pupil.

The Court granted the injunction because it felt that it was imperative that school boards be informed of the type of plan they must prepare for exceptional pupils. As well, the child would suffer irreparable damage if she was not sent to the same regular school.

The Court made the following orders:

a) The child is to be reintegrated in an ordinary eighth grade class;
b) The director general shall ensure that a committee is formed according to the Minister's guidelines;
c) The committee shall immediately requisition the funds for the services proposed by the

Minister;

d) The committee shall develop a preliminary plan for the integration of the child into the grade eight class before January 30, 1989;

e) The principal of the school shall ensure that the students and the teachers are prepared for the experiment that is to be attempted;

f) The parents will be involved at all stages, though they will not be allowed to make unilateral decisions, such as interrupting the pupil's participation in the program.

Rowett v. Board of Education for the Region of York, (1988) 63 O.R. (2d) 767 (S.C.).

ORDER SOUGHT:

The defendants seek an order to strike out those paragraphs in the statement of claim which allege that the Board was in breach of its statutory duty to provide the Rowett child a special educational program which was consonant with her rights under the Charter.

ISSUES:

1. Can a Court review the appropriateness of the placement of an "exceptional pupil" made by the tribunals empowered under the Education Act to make such a determination?

2. Did the various boards which made decisions pertaining to the Rowett child's placement have the jurisdiction to consider whether the child's rights under the Charter were being violated?

DECISION:

The application to strike out the relevant paragraphs of the statement of claim was granted.

The paragraphs in the statement of claim sought to have the Court decide on the appropriateness of the placement ordered by the board. This issue is not required in an action which seeks a declaration that the child's Charter rights have been violated.

Jaclyn Rowett has Down's Syndrome. For two years, she attended regular classes in her community. Then, in May 1985, an I.P.R.C. identified Jaclyn as an "exceptional child" and recommended that she be placed in a self-contained classroom for the educable retarded in a school situated 12 miles from her home. This decision was appealed unsuccessfully first to an appeal board, and then to a Special Education Tribunal. Both of these boards upheld the decision of the I.P.R.C..

The plaintiffs withdrew Jaclyn from the public school system and commenced an action for a declaration that the board was in breach of its statutory duties under the Education Act to provide a special education program appropriate the Jaclyn's needs. They also sought a declaration that by reason of the denial of Jaclyn's Charter rights, the board was in breach of the same statutory duty.

The plaintiffs were trying to place the issue of the appropriateness of Jaclyn's placement. The

Education Act stipulates that the decision of the Special Appeal Tribunal is final and binding. The decision was reached in the full and proper excercise of its jurisdiction and statutory duties. It is an abuse of the court to raise an issue in a court which has been finally determined by a tribunal of competent jurisdiction.

It is common ground that an administrative tribunal is not competent to grant remedies under the Charter. Accordingly, it was without jurisdiction to determine whether Jaclyn's rights were violated as a result of the placement.

The plaintiffs can ask the Court whether Jaclyn's rights were infringed. But, they cannot challenge the decision of the tribunals on the grounds that the tribunal did not consider Jaclyn's rights.

Townsend v. Board of Education for the Borough of Etobicoke (1986), 54 O.R. (2d) 449 (C.A.).

NOTE:

This is an appeal from *Re Maw, supra.* The parents of one of the children who were the subjects of *Re Maw* appealed the Divisional Court's decision.

ORDER SOUGHT:

To reverse the order of the Divisional Court, and thereby obtain a "hard to serve pupil" hearing for their child.

ISSUES:

1. Whether residency is a pre-requirement for a "hard to serve pupil" hearing.

2. Did the fact that the student had previously been a resident pupil for seven years qualify him for a "hard to serve pupil" hearing despite the fact that he was not a resident pupil when the parents applied for the hearing?

DECISION:

The Court of Appeal adopted the decision and the reasoning of the Divisional Court to the effect that "residency" at the time that the request is made by parents is a pre-condition to a "hard to serve pupil" hearing.

The parents had initially requested an I.P.R.C. hearing, but solely to obtain funding from the Ministry for Community and Social Services to send their child to a private school. However, the Education Act does not provide for an I.P.R.C. hearing to order or authorize payment of expenses incurred by a pupil in a private school. Under the Act and the Regulations, the purpose of an I.P.R.C. hearing is to identify and place pupils in special education programs provided by the board. This is not the relief which the parents really wanted.

The Act also provides for a "hard to serve pupil" hearing. When a board determines a pupil is a "hard to serve pupil" under section 34(7) of the Act and a placement suited to the needs of the pupil is located under section 34(9), the Province of Ontario is obliged to pay the cost of this placement (section 34(7)). This appears to be the relief the parents were seeking.

In this case, the appellants requested a "hard to serve pupil" hearing when the child was no longer enrolled or in attendance at any school under the jurisdiction of the board. Accordingly,

the appellants were not entitled to a "hard to serve pupil" hearing.

The appellants had argued that section 34(2) provided for two forms of the right to a "hard to serve pupil" hearing. It was their contention that the first three lines of the section refer to the entitlements of exceptional pupils who, by statutory definition, are resident pupils. The section also creates a second series of entitlements for parents of a pupil who consider their child incapable of profiting from the instruction given by the board. In this part of the section, the appellants contended, the word "pupil" is not preceded by the word "exceptional" and, consequently, the residency requirement is absent. The Court of Appeal rejected this argument, adopting the reasoning of the Divisional Court.

The Court of Appeal was prompt to add that if the application for the "hard to serve pupil" hearing had been made when the child was a resident student, it may be that his right to a hearing would have crystallized at that time and that the entitlement to a hearing would have continued despite his subsequent withdrawal from the school.

Yarmoloy v. Banff School District No. 102 (1985), 16 Admin. L.R. 147 (Alta. Q.B.).

ORDER SOUGHT:

The parents of a handicapped child apply for an order of mandamus to compel the Banff School Board to admit the child as a pupil and to compel the Board to give the parents a hearing prior to determining the child's placement.

ISSUES:

1. Could the Court compel the board to admit the child?

2. Did the board have to hold a hearing with the parents before deciding their daughter's placement?

DECISION OF THE COURT:

Nicole Yarmoloy is a development-delayed child who had received her education through a special program provided at the Banff Elementary School. Without consulting the parents, the Banff School Board passed a motion directing that the child attend a special school in Calgary. The effect of this would be disruptive to the child and her parents. Nicole would have to be placed in an institution in Calgary and she would have to travel between Banff and Calgary on weekends in order to see her parents.

Under the Alberta School Act a school board has been delegated the discretion of deciding the placement of students. The Court is not able to direct the school board to exercise its discretion in a particular way. Accordingly, the order to require the board to place the pupil in a school in Banff is refused. Procedural fairness requires that a student's parents be heard before a Board of Trustees decides to change a child's placement, especially when the consequences for the child and her parents are serious. Also, the parents were denied one level of appeal to a Local Appeal Board, in contravention with the Minister's policy. The Board of Trustees own reconsideration of this matter was not a sufficient substitute for an appeal to an independent Local Appeal Board. The whole procedure was flawed. Accordingly, the decision of the board regarding the pupil's placement is quashed and an order of mandamus is granted to compel the Board to give the parents a hearing to decide the pupil's placement.

APPENDIX B.

SUMMARY OF AMERICAN CASES AND COMMENTS

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Board of Education v. Rowley (1982) 458 U.S. 175

FACTS:

Amy Rowley is a deaf student. She was placed in a regular kindergarten class in order to determine what supplemental services would be necessary to her education. At the end of the trial period it was determined that Amy should remain in the kindergarten class, but that she should be provided with an FM hearing aid which would amplify words spoken into a wireless receiver by the teacher or fellow students. Amy succesfully completed her kindergarten year.

An IEP was prepared for Amy during the fall of her first-grade year. The IEP provided that Amy should be educated in a regular class, should continue to use the FM hearing aid, and should receive instruction from a tutor for the deaf for one hour each day and from a speech therapist for three hours each week.

The Rowleys insisted that Amy be provided with a qualified sign-language interpreter in all her academic classes. The Rowleys request was denied by the school administrators and by the Hearing Officer. The Rowleys then brought an action in District Court claiming that the denial of the sign-language interpreter constitued a denial of the "free appropriate public education" (FAPE) guaranteed by the Act. The disparity between Amy's achievement and her potential led the Court to decide that she was not receiving a FAPE. A divided Court of Appeals affirmed the District Court decision.

ISSUES:

1. What is meant by the Act's requirement of a FAPE?
2. What is the role of state and federal courts in exercising their review powers?

DECISION:

When the language of the Act and its legislative history are considered together, the requirements imposed by Congress become tolerably clear. Insofar as a State is required to provide a handicapped child with a FAPE, we hold that it satisfies this requirement by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction. Such instruction and services must be provided at public expense, must meet the State's educational standards, must approximate the grade levels used in the State's regular education, and must comport with the child's IEP. In addition, the IEP should be formulated in accordance with the requirements of the Act and, if the child is being educated in the regular classrooms of the public education system, should be

reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.

While Congress sought to provide assistance to the States in carrying out their constitutional responsibilities to provide equal protection of the laws, it did not intend to achieve strict equality of opportunity or services for handicapped and non-handicapped children, but rather sought primarily to identify and evaluate handicapped children, and to provide them with access to a free public education. The Act does not require a State to maximize the potential of each handicapped child commensurate with the opportunity provided non-handicapped children.

The decision of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

Note that this was not a unamimous decision. Justices Blackmum and White in dissenting opinions asserted that the intent of Congress was to give handicapped children equal opportunity commensurate with that given other children. See *Rowley*, 458 U.S. at 210 and at 214.

Carbon-Lehigh Intermediate Unit #21, Sept. 11, 1984 OCR, Complaint lofs, 257: 551.

FACTS:

Complainant alleged that:

1. Placement of students in special education school violated least restrictive environment requirements.

2. Facilities and non-academic activities provided at the special school were not comparable to those provided to non-handicapped students.

DECISION:

The school districts have failed to demonstrate that the students could not be educated in a less restrictive environment with the use of supplementary aids and services. The only reason for these placements was the asserted lack of classroom space in the regular environment. This reason, even if true, does not excuse the segregation of handicapped students without educational justification.

The activities offered at Bevan School were not nearly as extensive as those provided in the district's schools.

All of the schools in the district have a library, science laboratories, industrial art shops, home economics rooms, auditorium and a gymnasium. The Bevan School has none of these facilities.

REMEDIES:

Since the above violations were identified, the district has closed Bevan School and developed new IEPs to be implemented in schools enroling non-handicapped students.

Daniel R. v. El Paso Independent School District 1987-88 EHLR Dec. 559: 418 (Dist. Ct. Western Dist. of Texas).

FACTS:

Daniel is a mentally retarded and speech impaired child; he has developmental skills of a two year old. The defendant decided that Daniel should be removed from trial placement in regular pre-school class and returned to early childhood special education program. An impartial Hearing Officer affirmed the decision of the defendant. The parents of the appellant urge that the Education for All Handicapped Children Act (EHA) entitles their child to be placed in a "mainstream" classroom environment despite the child's inability to master any part of the pre-kindergarten curriculum.

DECISION:

The plaintiff's claim for relief is denied. The findings of the Hearing Officer will not be overturned.

REASONS:

The EHA does not require that all handicapped children be placed in a regular classroom environment. There is a preference, but not a mandate, to place handicapped children with children who are not handicapped. The plaintiff to succeed must show that the educational program of Daniel, as approved by the Hearing Officer, does not provide Daniel with a free, appropriate public education.

A child should be permitted access to regular classes when the use of supplementary aids and services allows the child to receive benefits from the class which are measurable and calculated to allow some type of progression. However, some children, even aided by supplemental aids and services in a regular classroom will never receive an educational benefit which approximates the level of skills and comprehension acquisition of non-handicapped children. In these latter cases, the regular classroom setting does not provide an "appropriate" education.

The *Rowley* decision cannot be applied because *Rowley* involved a hearing-impaired youth who was performing above the level of some classmates. Contrarily to Rowley, Daniel is a child who the local board and the Hearing Officer have determined is incapable of attaining any knowledge of the course material or achieving any advancement in a regular classroom curriculum at all. The conclusions of the board and the Hearing Officer are well supported and should be implemented.

Honig, California Superintendent of Public Instruction v. Doe 1987-88 EHLR Dec. 559: 231 (U.S. Supreme Court).

ISSUES:

1. Whether, in the face of the statutory prescription, State or local school authorities may nevertheless unilaterally exclude disabled children from the classroom for dangerous or disruptive conduct growing out of their disabilities.

2. Whether a district court may, in the exercise of its equitable powers, order a State to provide educational services directly to a disabled child when the local agency fails to do so.

FACTS:

The San Francisco United School District (SFUSD) expelled two emotionally disturbed children from school indefinitely for violent and disruptive conduct related to their disabilities. Doe brought this suit alleging that the suspension and proposed expulsion violated the EHA. The District judge issued a preliminary injunction directing defendants to return Doe to his then current educational placement. On appeal, the Court of Appeal held that an indefinite suspension in aid of expulsion constitutes a prohibited "change of placement" under 1415 (e) (3) of the EHA. The Court concluded, however, that fixed suspension of up to 30 school days did not fall within the reach of 1415 (e) (3). Lastly, the Court affirmed that portion of the injunction requiring the State to provide services directly to a disabled child when the local educational agency fails to do so.

NOTE:

The section of the judgment where the Court discusses the question of mootness (i.e., one of the petitioners is 24 years old and the Act limits eligibility to disabled children between the ages of 3 and 21) is omitted from this report.

DECISION:

The findings of the Court of Appeal are affirmed with modifications.

REASONS:

The Court of Appeal rightly decided that an indefinite suspension in aid of expulsion

constitutes a prohibited change of placement under 1415 (e) (3). However, school officials may temporarily suspend the student for up to 10 school days.

In the present case, the Court finds that the District Court, in enjoining the defendants from indefinitely suspending the respondent or otherwise unilaterally altering his then current placement, properly balanced the respondent's interest in receiving a free appropriate public education in accordance with the procedures and requirements of the EHA against the interest of the State and local school officials in maintaining a safe learning environment for all their students.

It is true that judicial review is normally not available under 1415 (e) (3) until all administrative proceedings are completed, but parents may by-pass the administrative process where exhaustion would be futile or inadequate. Finally, the Court affirmed the Court of Appeal's judgment on the question whether a court may order a State to provide services directly to disabled children where the local agency has failed to do so.

Kerkam v. District of Columbia Board of Education 1987-88 EHLR Dec. 559: 210 (Distr. of Columbia District Ct.).

FACTS:

K is a severely retarded child. From 1976 to 1984, K received a special education from the Virginia Public School system. K's parents became dissatisfied with the special education program and requested a hearing. The Hearing Officer found the placement appropriate. Shortly after the hearing, the parents placed K in a group home in Pennsylvania. They then asked the State of Virginia to pay for the placement but the state refused to do so. The plaintiff's parents then moved to the District of Columbia. The parents requested a due process hearing. Three such hearings were held. The Hearing Officer found that K does not require residential care in order to benefit from an appropriate special education program.

DECISION:

K needs residential care; defendant ordered to reimburse parents for cost of placement in Pennsylvania for school years 1984-85 through 1987-88.

REASONS:

The Court concludes that both the plaintiff and the defendant acted in good faith. The Court is satisfied based upon all the evidence that the Pennsylvania program represents an appropriate placement for K. The Court is further satisfied that it is possible that a similar type of group home, day school placement in the District of Columbia might be appropriate, but that no such program exists today. Finally, the Court concludes that the total program (i.e., both the school and the group home should be funded by the District of Columbia).

Marathon County Handicapped Children's Education Board, June 28, 1985, OCR, Complaint lofs 352: 47.

FACTS:

Complainants alleged that their daughter's special education placement in a segregated facility did not provide the most integrated education appropriate for their daughter.

DECISION:

After extensively reviewing the evidence, the OCR held that MCHCEB was in violation of Sect. 504 and that the complainant's daughter should be provided with an appropriate program in the regular education environment.

Nebraska State School for the Deaf, August 14, 1979, OCR, Complaint lofs 311: 13.

SUMMARY OF NONCOMPLIANCE:

1. NSD improperly develops IEPs by (i) considering parental input after IEP has been implemented; (ii) not informing parents of reasons for including long and short term goals; and, (iii) failing to discuss development of IEPs with school psychologist and house-patient.

2. NSD operates programs in a manner that minimizes rather than maximizes the ability of its students to participate with non-handicapped students (i.e., by failing to mainstream students, by segregating extracurricular activities such as Cub Scout, Brownies).

3. By requiring all students to participate in a vocational instruction program, NSD discriminates on the basis of a handicap. Handicapped students must be afforded the same range of academic and elective courses provided to non-handicapped students.

4. NSD must provide counselling and guidance programs comparable with that afforded non-handicapped students.

Roncker v. Walter 1983 EHLR Dec. 554: 381 (U.S. Court of Appeals).

FACTS:

The plaintiff's son N, is a severely retarded nine year-old who has a mental age of two to three with regard to most functions. The school district decided to place N in a school exclusively for mentally retarded. The plaintiff refused to accept the placement and sought a due process hearing. The Hearing Officer ordered that N be placed within the appropriate special education class in the regular elementary school setting. The school district appealed to the State Board. The board held that N should be placed in a school for the handicapped so long as some provision is made for him to receive contact with non-handicapped children.

DECISION:

The Act does not require mainstreaming in every case but its requirement that mainstreaming be provided to the maximum extent appropriate indicates a very strong congressional preference. In a case where the segregated facility is considered superior, the court should determine whether the services which make that placement superior could be feasibly provided in a non-segregated setting. If they can, the placement in the segregated school would be inappropriate under the Act. While mainstreaming is the preferred solution, we must realize the possibility that some handicapped children must be educated in segregated facilities either because the child would not benefit from mainstreaming because any marginal benefits received by mainstreaming are outweighed by the benefits gained from services which could not be provided in the non-segregated setting, or because the handicapped child is a disruptive force in the non-segregated setting. Cost is also a proper factor to consider since excessive spending on one handicapped child deprives other handicapped children.

NOTE:

The case was remanded to the district court for further proceedings consistent with the opinion expressed by the Court of Appeal.

Schwaubenon School District, June 2, 1988, OCR, Complaint lofs, 311: 120.

DECISION:

School districts had been in noncompliance with Sect. 504 by rejecting a regular school placement for students at the Syble Hopp School (special school attended solely by handicapped students), absent demonstration that their placement in a regular educational environment with the use of supplementary aids and services cannot be achieved satisfactorily, and by failing to demonstrate that all of these students have been offered the opportunity to participate in activities with non-handicapped students to the maximum extent appropriate.

Thornock and Baugh v. Boise Independent School District #1 1987-88 EHLR Dec. 559: 486 (Idaho Supreme Court).

FACTS:

Plaintiff T is a multiply handicapped child who has been classified as "trainable mentally retarded". T's parents decided to place him in a private school. All of the private schools contacted by his parents required that he have the assistance of a full-time one-to-one aide. Once T was enrolled in a private school, his parents started administrative proceedings to obtain reimbursement for the one-to-one aide. The defendant was advised by its legal counsel that the school board was not financially responsible for the services of a full-time one-to-one aide provided in a private school. The plaintiff was offered instead, placement in a segregated classroom for "special education" children. The plaintiffs contended the T was entitled to receive "mainstreaming" under federal statute. However, T's parents chose to keep him in the private school setting and initiated administrative proceedings in which they sought reimbursement for the cost of the one-to-one aide and the tuition at the private school. The Hearing Officer ruled in favour of the defendant. The district court reversed the decision. BISD now appeals.

ISSUES:

1. Whether the BISD fulfilled its legal obligation to offer Thornock a Free Appropriate Public Education (FAPE).

2. Whether the school district's duty to provide a FAPE is obviated because of Thornock's parent's selection of private school placement for their son.

DECISION:

In a 3-2 decision, the Court affirmed the decision of the district court.

REASONS:

The purpose of the EAHCA is to make available to all handicapped children a free appropriate public eduction. A FAPE must be provided in the least restrictive environment, and Congress has expressed a strong preference for mainstreaming handicapped children in non-handicapped educational settings. The critical feature of any FAPE is that it must be in conformity with a handicapped child's "individual education program" (IEP). The EAHCA makes clear that the fundamental prerequisite of any FAPE is a sufficient IEP. The procedural aspects of the EAHCA are just as important as its substantive provisions. The school district

prepared two IEPs. However, neither document sets forth goals and objectives as required by 20 U.S.C. Sect. 1401 (19). Nor do they contain a statement of the extent to which T "will be able to participate in regular educational programs". Because of the flaws in T's "IEP's", we affirm the decision of the district court. Without a valid IEP there can be no FAPE.

As for the second issue, the school district cannot abdicate its vital role merely because T is enrolled in a private school. Even if a child is placed in a private school unilaterally by his or her parents, the state educational agency must ensure that an IEP is developed and implemented for the child.

Finally, the defendant must reimburse plaintiffs for T's tuition at the private school plus payments made to his one-to-one aides for the school years.

Virginia Department of Education and Fairfax County Public Schools, July 1, 1985, OCR, Complaint lofs 257: 658.

The complainant alleges that:

1. FCPS denies a Free Appropriate Public Education (FAPE) to handicapped students for whom no appropriate placement in an approved private school exists by refusing to recommend placement in a non-approved school.

2. VDE denies a FAPE to handicapped students by providing tuition reimbursement to school divisions only when placement is made in an approved school.

3. FCPS denies a FAPE to students by deciding a child's placement before developing his IEP.

4. FCPS denies a FAPE to students by failing to include in the IEPs the educational services to be provided.

5. VDE's practice of placing handicapped students in residential schools enroling only handicapped students denies these handicapped students an education with persons who are not handicapped to the maximum extent appropriate.

DECISION:

The rationale for having a list of approved private schools is to provide for the safety of children; the policy serves a legitimate purpose. FCPS maintained that, given the wide range of approved private schools, there has never been a need to place a student in a non-approved school.

Virginia law gives the local education agency (LEA) the power to place handicapped children in non-approved schools. The OCR has found instances where the LEA has paid for educating handicapped children in non-approved facilities. Thus, there is no denial of FAPE.

The FCPS states that the IEP is developed before placement is decided on. The FCPS policy and procedures support this contention, as do the facts in the case of the complainant's child.

Although the IEP is required to contain the educational goals and objectives for each child, it is not expected to be so detailed as to be a substitute for a daily lesson plan. FCPS's IEPs contain the required educational goals and objectives.

The absence of non-handicapped students does not constitute a violation of Sect. 504 when the residential placement of a child is the least restrictive placement appropriate for the child's needs.